LIM KAH WAN

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPEAL NOS. 78 & 79 OF 1983]
29 APRIL 1985

CRIMINAL LAW AND PROCEDURE**:** *Appellant prosecuted for drug trafficking - Heroin found in car - Opportunities for access to car by other persons - Envelope stained with heroin - Nexus between property found in possession and the crime alleged - Public interest in passing sentence.*

EVIDENCE: *Admissibility of statements - Actions before caution administered.*

The appellant was about to drive his car away when he was set upon by three Anti-Narcotics police officers. He was immediately placed under arrest and handcuffed. While the officers were searching the boot of the car, the appellant who had not been cautioned said "Don't waste your time" and nodded towards the front passenger seat, saying, at the same time, "That's the stuff". A further search of the front passenger seat recovered 269.01 grammes of heroin. Later, the appellant led some police officers to his house and there was recovered an envelope contaminated with heroin. Under cross-examination however PW3 (one of the three Anti-Narcotics police officers) frankly admitted that he could have caused the contamination.

Evidence was also led that the car in question was a demonstration model and that it was also used to run errands and was therefore generally accessible to many people.

The appellant was found guilty and convicted by the learned President of the Penang Sessions Court. He appealed. The Public Prosecutor cross-appealed.

The main issues were:

(i) Whether there was a misreception of the evidence of the recovery of the stained envelope and a misreading of the evidence of PW3 regarding the possibility of him contaminating the envelope;

(ii) If so, whether there has been a miscarriage of justice.

Held:

[1] There was a misreception of evidence. To make property found in the prisoner's possession admissible in evidence there must be some nexus or link between the property and the crime alleged. The object of such admission is to identify the accused person with the crime charged against him. It is not admissible if it merely proves a criminal disposition or propensity. There was no such nexus between the envelopes found and the appellant so as to identify the appellant with the crime alleged.

[2] The learned President had misrejected the evidence of the appellant's verbal statements before caution was administered. The nodding of the head was so inextricably interwoven with his verbal statements that the action of nodding must be considered as part of his statement. This statement was distinctly related to the discovery of the heroin in the car so as to attract s. 27(1) of the Evidence Act and hence admissible as evidence. There was thus *prima facie* evidence that the appellant placed the heroin in the car and hence had exclusive

custody or control of it. The presumptions in s. 37(d) and (da) of the Dangerous Drugs Act were therefore attracted and these presumptions have not been rebutted by the appellant. There was therefore no miscarriage of justice.

[3] The learned President had not given due weight to the factor of public interest in passing sentence on the appellant.

[Appeal dismissed. Public Prosecutor's cross-appeal allowed and appellant ordered to suffer six strokes of the rotan in addition to the sentence of life imprisonment passed by the learned President.]

Cases referred to:
Shanmugam v. PP [1963] MLJ 125
Goh Ah Yew v. PP [1949] MLJ 150
Regina v. Gallagher [1974] 1 WLR 1204
PP v. Lim Kuan Hock [1967] 2 MLJ 114
Tay Choo Wah v. PP [1976] 2 MLJ 95
Rex v. Taylor [1923] 87 JP 104
Rex v. Thompson [1917] 2 KB 630; [1918] AC 221
Rex v. Reading [1966] 1 All ER 521
Rex v. Sims [1946] 1 KB 531
George Manning [1923] 17 Cr App Rpt 85
PP v. Toh Ah Keat [1977] 2 MLJ 89
PP v. Sandra Margaret Birch [1977] 1 MLJ 129
Lee Lian & Ors. v. PP [1956] MLJ 191
PP v. Siew Sung [1966] 1 MLJ 145

Legislation referred to:
Criminal Procedure Code, ss. 113(1), 422
Dangerous Drugs Act 1952, ss. 2, 37A(1), 37(d), 37(da), 39B
Evidence Act 1950, ss. 27(1), 167

For the appellant - K. Kumaraendran (Mahinder Singh Dulku with him); M/s Kumar & Co. and M/s Mahinder Singh Dulku & Co.
For the respondent - Mohamed Bazain bin Idris DPP

JUDGMENT

Edgar Joseph Jr J:

On the afternoon of 23 September 1981, a man was seen about to enter a Toyota Corolla car parked at the FIMA Supermarket car park and drive it away - in point of fact, he had already opened the door, had one foot in the car, a hand on the steering wheel and the ignition key in place, when he was set upon by three police officers attached to the Anti-Narcotics Department namely PW1, PW2 and PW3 who obviously had been lying in wait either for him or his car - which, it is not clear. He was immediately placed under arrest and handcuffed. That man was the appellant. A search of the boot of his car followed in his presence but nothing incriminating was found. At this point, according to PW2, the appellant who had not been cautioned said: "Don't waste your time" and nodded with head towards the front passenger seat, saying, at the same time "That's the stuff".

PW2 then conducted a further search of the front passenger seat area and recovered from its footwell, two envelopes, in which were plastic packets containing a substance later certified by the Government chemist to be 269.01 grammes of heroin, a dangerous drug within the meaning of s. 2 of the Dangerous Drugs Act, 1952 ("the Act").

Later, the same day, the appellant led a party of police officers headed by PW3 to his house and, from a room there, which the appellant had been sharing with his sister, recovered from a dressing table, an envelope which subsequent analysis by the chemist revealed was contaminated with heroin. Also recovered from this dressing table, were the appellant's Restricted Passport and National Registration of Identity Card.

However, under cross-examination PW3 had frankly admitted that the contamination was probably innocent as he could have caused it inadvertently having earlier handled the packets of heroin recovered from the car.

Upon the above facts, the appellant was prosecuted in Sessions Court No. 1 in Penang on a single count of trafficking in a dangerous drug, to wit, 269.01 grammes of heroin, in contravention of s. 39B of the Act. At his trial, the prosecution led evidence of the circumstances leading to the appellant's arrest which I have outlined.

Upon objection being taken to the admissibility of the statements and actions of the appellant at the car park soon after his arrest, because no caution had been administered in accordance with the requirements of proviso (b) to s. 37A(1) of the Act, the learned President upheld the same and accordingly ruled the evidence to be inadmissible.

Then, there was evidence that at the material time the appellant was a car salesman and that the Toyota concerned had been assigned to him as a demonstration model and also to run errands for his employer - a company dealing in cars. But there was also evidence that on the day in question two intending purchasers had test - driven the car between 10 and 11 a.m. - one of them being unaccompanied. When the car returned, it was not checked and it was generally accessible to brokers and other staff of the company.

However, at some time past 1 p.m., the appellant had taken the car saying he was going to the office of the Registrar and Inspector of Motor Vehicles. He returned at 3 p.m. and then took the car out again. All this evidence regarding the car was elicited from PW4, a director of the car company.

Upon the above evidence, the learned President ruled, at the close of the case for the prosecution, that there was a case to answer and he called upon the appellant to enter upon his defence.

According to the appellant, he had gone to the FIMA Supermarket on the day in question in response to a telephonic message conveyed to him by one of his colleagues at the office that a girlfriend of his had rung to meet him there. However, neither the colleague nor the girlfriend was called to confirm this.

I wish to make it clear, however, that in Law the defence of an accused person does not require corroboration though it goes without saying that corroboration would certainly help - *Shanmugam v. PP* [1963] MLJ 125. There is no duty on the defence to call any evidence for all it has to do is to raise a reasonable doubt - *Goh Ah Yew v. PP* [1949] MLJ 150. Accordingly, no adverse inference can be drawn against an accused person by reason of his failure to call any witness. However, the failure to call any particular witness is a matter which the Court may take into account in assessing the weight of evidence (without drawing any adverse inference) especially so when the potential witnesses were persons in respect of whom the prosecution had probably no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence: *Regina v. Gallagher* [1974] 1 WLR 1204; *PP v. Lim Kuan Hock* [1967] 2 MLJ 114, 115; *Tay Choo Wah v. PP* [1976] 2 MLJ 95, 100.

The appellant added that on arrival at the FIMA Supermarket he found no sign of his girlfriend and was preparing to drive off when he was set upon by PW1, PW2 and PW3. He denied all knowledge of the envelopes which contained the offending exhibits which were recovered from the front passenger's footwell. He also testified as to the opportunities for access to the car by other persons to which I have already adverted when discussing the evidence for the prosecution.

As to the recovery of the envelope from the room in his house, he denied knowledge of its presence there and explained that it was a room he shared with his sister who was not called to testify.

In the event, the learned President found that the charge had been proved beyond all reasonable doubt and entered conviction. He then proceeded to pass the mandatory sentence of life imprisonment but exercised his discretion in favour of the appellant by refraining from imposing corporal punishment.

In his reasons for decision, the learned President admitted and relied on evidence as to the recovery of the envelope from the room and discounted the defence contention of innocent contamination by PW3 when he observed, quite incorrectly, that PW3 had admitted such contamination to be merely "possible". In point of fact, the witness had admitted not that this was "possible" but "probable".

The learned President concluded, as a result, that evidence of recovery of this envelope was consistent with the appellant's possession of the envelopes containing the heroin which were recovered from the car, that is to say, the subject matter of the charge and, accordingly, invoked the presumptions under s. 37(d) and (da) of the Act material parts of which are reproduced hereunder.

He dismissed, as wholly improbable, the defence contention that the heroin might have been left behind in the car by persons such as customers, salesmen or brokers bearing in mind that it was a highly marketable and valuable commodity.

Before me, the conviction was attacked by Counsel for the appellant on a number of grounds which I would summarize thus:

1. there was a misreception of evidence, namely, evidence of the recovery of the envelope from the room of the appellant's house and also a misreading of the PW3's evidence regarding the finding of traces of heroin on it;

2. the evidence of possession of the offending exhibits, the subject of the charge, was purely circumstantial and in no way conclusive bearing in mind that others had access to the car that day. It was, at most, evidence of mere juxtaposition;

3. in the absence of evidence, it was wrong for the learned President to conclude that the two envelopes containing the offending exhibits were beside the driver's seat on a floorboard and so were clearly visible and within easy reach of the appellant;

4. the defence of the appellant, that he had no knowledge of the presence of the offending exhibits in the car, not having been disproved by the prosecution, was more than sufficient to raise a reasonable doubt in his favour.

As regards point one, to make property found in prisoner's possession admissible in evidence there must be some nexus or link between the property and the crime alleged: See for example *Rex v. Taylor* [1923] 87 JP 104. A further illustration of this principle is proved by *Rex v. Thompson* [1917] 2 KB 630 affirmed by the House of Lords [1918] AC 221 where evidence of

powder puffs and indecent photographs found in the prisoner's possession had been held relevant to corroborate identity on a charge of gross indecency. *Rex v. Thompson* was applied in *Rex v. Reading* [1966] 1 All ER 521. See also *Rex v. Sims* [1946] 1 KB 531, 538 where Goddard CJ said:

> Thus, in the case of burglary, evidence is admissible that housebreaking implements such as might have been used in the crime were found in the possession of the accused.

Clearly, however, in all cases, where such evidence is admitted, its object is to identify an accused person with the crime charged against him. Consequently, evidence that the accused was in possession of tools of crime other than those which were or might have been used to commit the crime charged or tools of such a nature is, in the absence of some special connection, inadmissible on the ground that it does no more than prove a criminal disposition or propensity; for example, in *Taylor* [1923] 17 Cr App Rpt 109 a conviction for housebreaking was quashed on the ground, *inter alia*, that evidence of the finding of a jemmy in the house of the accused was inadmissible because it had not been suggested that a jemmy had been used in the commission of the offence charged. Similarly, if the case for the prosecution was that entry was effected by a key, the finding of a jemmy would be inadmissible; *George Manning* [1923] 17 Cr App Rpt 85, 88.

In this case, although the chemist had certified in his report that the envelope recovered from the room was similar to those recovered from the car in size, colour and texture, I do not consider, having regard to the evidence of the general availability of such envelopes, the fact that the appellant shared the room with his sister and the testimony of PW3 that there had probably been innocent contamination, that it was right for the learned President to have admitted and relied on this evidence. Accordingly, there was a misreception of evidence and what I have now to consider is whether this had occasioned a miscarriage of justice (see s. 422 of the Criminal Procedure Code and s. 167 of the Evidence Act, 1950).

This brings me to a consideration of evidence of verbal statements and actions by the appellant at or about the time of his arrest which I had adverted to when discussing the case for the prosecution and which the learned President held to be inadmissible by reason of the omission on the part of the arresting officers to caution the accused under the provisions of proviso (b) to s. 37A(1) of the Act.

Now, s. 27(1) of the Evidence Act, 1950 provides as follows:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

It has been held, and I agree, that this provision is quite separate from and complementary to proviso (b) to s. 113(1) of the Criminal Procedure Code (which is in *pari materia* with proviso (b) to s. 37A(1) of the Act): See *PP v. Toh Ah Keat* [1977] 2 MLJ 89 per Hashim Yeop Sani J (as he then was) and *PP v. Sandra Margaret Birch* [1977] 1 MLJ 129 per Arulanandom J.

It is indisputable that at the material time the appellant was an accused and in custody so that the only question for consideration is whether he had given information which distinctly related to the discovery of the offending exhibits.

What the appellant said just before he nodded his head namely "Don't waste your time" and immediately after "That's the stuff" were all so inextricably interwoven that both verbal statements and the action of nodding had to be admitted in order to understand what the appellant had intended to convey.

The appellant's action of nodding was part of his statement: See *Lee Lian & Ors. v. PP* [1956] MLJ 191 where Thomson J (as he then was) held that "statements must be construed as including actions such as pointing out a person" at an identification parade and *PP v. Siew Sung* [1966] 1 MLJ 145 where H.T. Ong Ag CJ (as he then was) held that even opening of a pin-table machine with a key by an accused at a police station amounted to the making of a statement.

I am therefore satisfied that the evidence objected to was misrejected by the learned President being rightly admissible as information leading to discovery under s. 27 of the Evidence Act.

The effect of my conclusion regarding this part of the case is that there was *prima facie* evidence that the appellant - who, be it noted, was in sole charge of the car at the time of his arrest - must have been the person who placed the offending exhibits in the car.

There was also, as a result, *prima facie* evidence that the appellant had exclusive custody or control of the envelopes in the car which contained the offending exhibits. This would be sufficient to attract the operation of the presumptions contained in s. 37(d) and (da) of the Act which respectively provide as follows:

> In all proceedings under this Act...
>
> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;
>
> (da) any person who is found in possession of:
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> (i) 15 grammes or more in weight of heroin;
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> (ii) ...;
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> (iii) ...;
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> (iv) ...;
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> (v) ...;
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> (vi) ...;
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> (vii) ...;
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> (viii) ...;
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> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;

The appellant's denial of knowledge of the presence of the offending exhibits in the car, which had been rejected by the learned President, could in no way rebut the *prima facie* case aforesaid, having regard to the evidence especially that which was misrejected by the learned President.

It follows, therefore, that the misreception of the evidence as to the recovery of the envelope from the room of the appellant, the subsequent reliance on it and the misreading of PW3's testimony with regard thereto by the learned President, did not, in the circumstances, occasion a miscarriage of justice. That being so, the other grounds of appeal must fail and do not call for consideration.

In the result, I dismissed the appeal though on grounds wholly different from those advanced by the Court below.

That, however, does not conclude the matter because, there was also, a cross appeal by the Public Prosecutor urging that the learned President was wrong in omitting to make an order as to corporal punishment. Having regard to the quantity of hard drugs involved and the epidemic proportions of this type of offence, I was satisfied that the learned President had failed to give any consideration to the all important factor of public interest while at the same time giving undue weight to factors personal to the appellant such as his age and his clean record. In the circumstances, I allowed the Public Prosecutor's cross appeal and ordered that the appellant should suffer six (6) strokes of the rotan. Bearing in mind that the appellant could well have been prosecuted in the High Court, and, on conviction, been almost certainly sentenced to death, this must seem almost like a birthday present.

Also found at [1985] 2 CLJ 473